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SUPREME COURT, U.S.
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No. 237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

VERA GIOVANETTI, *Petitioner*

v.

GEORGETOWN UNIVERSITY HOSPITAL, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petition for a writ of certiorari should be summarily denied. The reasons advanced in support of the petition are a jumble of confusion which require more space to answer than the nature of the petition deserves.

However, something like a precise history of the proceedings below is in order. This action was instituted for damages for the wrongful death of petitioner's decedent due to alleged medical malpractice. When the depositions of all the principal parties had been taken, the respondents moved in the District

Court for summary judgment. Following a hearing, partial summary judgment was entered on behalf of the respondents pursuant to Rule 36 (d), F.R.C.P. The court left to be tried a single factual issue. Despite repeated efforts by the petitioner to have the court reconsider and change its ruling pertaining to the partial summary judgment, the order remained effective.

In due course petitioner's case came on for trial. When the case was tried petitioner requested permission to take "a voluntary non-suit". (App. 1a) There followed the proceedings set forth in Appendix 1a-6a. As may be seen by a reading thereof, respondents' counsel opposed the petitioner's request, thereby foreclosing a voluntary dismissal under Rule 41 (a)(1), F.R.C.P. Feeling that petitioner's gambit was another attempt to avoid the impact of the prior adverse ruling by the District Court, respondents suggested that if the action was to be dismissed, the court in the exercise of its discretion should require a dismissal with prejudice under Rule 41(a)(2), or dismiss the action for want of prosecution in accordance with Rule 41(b), in view of the admission made by petitioner's counsel that he was unable to prove a cause of action under the one issue left open for trial.[1] (App.

[1] A previous memorandum of the pretrial judge to the trial judge dated April 16, 1957 said, *inter alia:*

"I can see no reason why this case should not be set for trial, and it is not to be postponed under any circumstances because of lack of counsel, the plaintiff indicating in her motion that she is either more than ordinarily familiar with Court proceedings or has had the advantage of professional advice.

"This case has been pending in this court since October 27, 1953 and it is the type of action by virtue of its circumstances that lends itself to the clogging of the docket and criticism direction toward the court."

4a) The trial judge at first mistakenly thought that he did not have the power to require a dismissal with prejudice. (App. 4a) When petitioner's counsel objected to the words "for want of prosecution", the court modified the language of its ruling to call it a dismissal "on the ground of the inability of plaintiff to prove a cause of action on the issues as limited by the court". (App. 6a, 7a). An order embodying this ruling was signed October 8, 1957. Reconsideration failed on November 14, 1957. (App. 7a)

An appeal was then taken from these orders. (T. 80—No. 14,299) In the course of this appeal petitioner did not question the earlier rulings of the District Court which granted respondents partial summary judgment. Petitioner questioned only the action taken by the trial court in dismissing her action.[2]

Following the receipt of her brief, the respondents moved in the Circuit Court of Appeals to dismiss the appeal as frivolous and submitted a brief in support thereof. (R. 14,299, pp. 74-78) The motions to dismiss were denied by the Court of Appeals and the case was set down for oral hearing. (R. 14,299, pp. 79, 80). The court, without opinion, remanded the case to the District Court:

> ". . . for the purpose of clarifying its orders of October 8, 1957, and November 14, 1957, in respect of: (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, as that expression is used in the Federal Rules of Civil Procedure." (App. 11a)

[2] Petitioner's brief in the Court of Appeals was not docketed as part of the record in support of her petition. Respondents, however, have lodged with the Clerk of this Court a copy of that brief.

This order of remand of the Court of Appeals of October 6, 1958 further provided:

> "If clarification is made by memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within ten days after the filing of such memorandum. If clarification is made by an order of the District Court amending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom." (App. 11a)

On remand the District Court reconsidered the matter and on October 22, 1958 ordered the case "dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Fed. Rules of Civil Procedure". (App. 13a) The District Court also filed a memorandum opinion supporting and explaining this order. (App. 12a)

Petitioner then filed a notice of appeal on November 1, 1958 from this order of the District Court of October 22, 1958. (T. 14,844, p. 95) On the same date she also filed a motion in the Court of Appeals in her previous appeal to reinstate that appeal. (R. 14,299, p. 83)

Since the District Court had complied with the order of remand and had entered a new order, petitioner's recourse was obviously to pursue her new appeal rather than to reinstate the old. Presumably, petitioner also thought so for on December 10, 1958 she docketed her record in the Court of Appeals in pursuance of her previously filed notice of appeal and a new number was assigned her case, No. 14,844. Observing this action, the Court of Appeals on December 15, 1958 denied petitioner's motion to reinstate her

appeal in No. 14,299. Petitioner then, however, took no further steps toward prosecuting her appeal in No. 14,844 until January 20, 1959 when she filed a "Motion for Leave to File Brief, Time Having Expired, And, Motion to Allow Brief in 14,299 To Be Accepted as Brief in the Instant Action (14,844) and Motion to Grant Appellant Additional Time to Add Volume 2 to Brief in 14,299—At a Time No Later Than January 31, 1959". (R. 14,844, p. 1)[3] She stated in her moving papers that Volume 2 was intended to indicate to the court the errors of the trial court—not in granting partial summary judgment—but in its explanatory memorandum and order of October 22, 1958. (R. 14,844, p. 2)

The Court of Appeals, rather precipitously assuming there was no opposition, granted this motion before respondents could reply. (R. 14,844, p. 3) Accordingly, a motion by the respondents for a reconsideration was prepared and filed on February 3, 1959 in which respondents opposed the petitioner's request for relief pointing up her failure to comply with the rules governing appeals. (R. 14,844, p. 6)

Meanwhile, no second volume of a brief was filed by petitioner on January 31, 1959, nor did she make any attempt to file such a brief thereafter. Accordingly, there was nothing before the court other than the issues raised by appellant in her brief in No. 14,299, as to which the court had already acted. She had indicated

[3] Up until this time petitioner had not served upon respondents a designation of record on appeal as required by Rule 75(a) F.R.C.P.; had not served a statement of points on which she intended to rely on appeal as required by Rule 15 of the Rules of the Court of Appeals and had not filed a cost bond on appeal as required by Rule 73(c) F.R.C.P.

in her moving papers for permission to file a second brief that she intended only to attack the District Court's order of clarification.

The Court of Appeals kept the respondents' motion for reconsideration *sub judice* until March 23, 1959. Meanwhile, there had been no attempt by petitioner to supply the court with a second brief or to remedy her omissions in the course of perfecting her appeal. On the latter date, the Court of Appeals dismissed the appeal in No. 14,844 for a failure to comply with Rules 15 and 16(b) of the rules of that court. The court further found that the District Court had not abused its discretion in dismissing the plaintiff's action for want of prosecution as specified in the order of October 22, 1958. (R. 14,844, p. 14) It is this order which petitioner seeks to review by her petition for writ of certiorari.

The foregoing rather complex history has been brought about largely because of petitioner's own conduct. At every step her papers have either been late, not filed at all, not served upon respondents or abundantly confusing.

She protests in her current petition that the merits of her case have never been heard on appeal. By this she presumably means that the validity of the earlier rulings granting partial summary judgment have not been tested on appeal. But she has never sought to raise these alleged merits or taken steps to present them in an orderly manner before any court.

The only complaint she has made in her two appeals is that she should have been permitted to take a "voluntary non-suit" on October 7, 1957 instead of having it dismissed for want of prosecution.

Petitioner, however, is engaged in idle controversy. As disclosed by her original complaint, her husband died on November 22, 1952. By virtue of the provisions of the District of Columbia Wrongful Death Act, D. C. Code (1951) § 16-1202, her action could have been brought only during the course of one year following death. Had she been granted a voluntary non-suit, useless litigation would have followed. Its re-institution after October 7, 1957, would have been barred by limitations. Accordingly, this court is now being imposed upon by a useless petition. The trial court was eminently justified in dismissing for want of prosecution. Under the circumstances the petition for a writ of certiorari should be denied.

Respectfully submitted,

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